IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: ANTOINETTE KITCHEN,	)	Chapter 13
Debtor.	)	Case No.: 16-11359-BFK
ANTOINETTE KITCHEN,	)	
Plaintiff,	)	A.P. No. 16-01191
v.	)	
WELLS FARGO BANK, NA d/b/a WELLS FARGO DEALER SERVICES,	)	
Defendant.	)	

OBJECTION TO APPLICATION FOR FEES AND EXPENSES

Wells Fargo Bank, NA, d/b/a Wells Fargo Dealer Services ("WFDS"), through the undersigned counsel, hereby objects to the Application By Debtor's Counsel for Approval and Payment of Attorney's Fees and Costs (Dkt. No. 23) (the "Fee Application"), and respectfully states as follows:

Summary of Objection

This case should be over. WFDS has taken all steps necessary to obtain a new title for Ms. Kitchen's car, in her name, and she has registered her car. WFDS even obtained a waiver of the taxes that were originally assessed in connection with the issuance of the new title. Further, in an effort to avoid further litigation expenses, WFDS issued an offer of judgment, which Plaintiff accepted. Shortly after the acceptance of the offer of judgment, Plaintiff's counsel requested that WFDS issue a check payable to his firm so that Ms. Kitchen would not receive a

W-9 "for his share" of the $10,000. Counsel later changed his position, and has now moved for an award of more than $12,000 in legal fees in addition to the amount of the offer of judgment.

The Fee Application should be denied because, under well settled law, Plaintiff is not entitled to additional fees under 11 U.S.C. § 362(k)(1) and Fed. R. Civ. P. 68. Furthermore, even if any fees were permissible (and they are not), the Fee Application: (i) improperly seeks fees for the period following the offer of judgment on December 22, 2016; (ii) improperly seeks attorneys' fees that were not reasonable, necessary, and actually incurred by plaintiff; (iii) lacks sufficient information and documentation regarding the time spent, services performed, and terms of engagement; and (iv) fails to satisfy other requirements for an award of fees. Plaintiff also purports to identify an expert witness without providing the disclosures required under FRBP 7026, and even though the deadline for any such disclosures expired in December 2016.

Plaintiff and her counsel are overreaching. Under applicable law, they are not entitled to any fees or expenses other than what is provided in the offer of judgment. The Fee Application, which never should have been filed, should be denied in its entirety.

Argument

1. WFDS Took Reasonable Steps and Restored the Car Title to Plaintiff.

As an initial matter, it is important to recognize that Ms. Kitchen has received the requested new title for her car at no cost to her. Because Plaintiff continues to assert that "Wells Fargo failed to turn over a proper title to Kitchen," Wells Fargo will provide a brief chronology of the issues related to the car title in the context of this adversary proceeding:

> October 7, 2016: Plaintiff files complaint. (Dkt. No. 1). At this time, Ms. Kitchen had not yet returned to WFDS the executed power of attorney and odometer reading that WFDS had requested in writing on June 23, August 19, and October 3, 2016. *See* Declaration of Maria Orozco, Dkt. No. 9-1.

October 13, 2016: Plaintiff files motion for preliminary injunction and notice of hearing. (Dkt. Nos. 2, 6). Plaintiff subsequently filed an amended motion for preliminary injunction and notice of hearing. (Dkt Nos. 5, 7).

October 18, 2016: WFDS receives executed power of attorney and odometer reading from Ms. Kitchen. Dkt. No. 9-1, ¶ 8. Ms. Kitchen later acknowledged that she did not provide an executed power of attorney before this time. (Transcript, January 10, 2017, p. 17).

October 20, 2016: WFDS submits application for duplicate title in Ms. Kitchen's name, along with the requisite power of attorney and fees, to the Maryland Motor Vehicles Administration via overnight Federal Express. (Dkt. No. 9-1, ¶ 9).

October 29, 2016: Counsel for WFDS provides plaintiff's counsel with a copy of the application to the Maryland MVA and requests that the motion for preliminary injunction be withdrawn. (***Exhibit A***). Plaintiff's counsel responds that they will move forward with the hearing. (***Exhibit B***). WFDS files an opposition, with an affidavit and supporting documentation, on November 7, 2016. (Dkt. No. 9).

November 8, 2016: A hearing is held on plaintiff's amended motion for preliminary injunction. Plaintiff's counsel does not present any witnesses or move for the admission of any evidence to support the motion. After a 12 minute hearing, the motion is denied. (***Exhibit C***).

November 9, 2016. WFDS advises Plaintiff that the title application has been denied in Maryland and that "the issue could be that the original title was issued in Virginia but Ms. Kitchen now lives in Maryland." WFDS also advises Plaintiff that WFDS is contacting the Virginia DMV. (***Exhibit D***).

November 18, 2016: WFDS submits title paperwork to the Virginia DMV. (***Exhibit E***).

December 2, 2016: WFDS advises Plaintiff that, in a follow up call, the Virginia DMV reported that "processing takes approximately 10-14 days, but may be longer because of the holidays." (***Exhibit D***).

December 6, 2016: Plaintiff files another motion for preliminary injunction (Dkt. No. 15) and a request for an expedited hearing (Dkt. No. 16). The request for an expedited hearing is not granted (Dkt. No. 18), and the motion is never noticed for hearing.

December 22, 2016: WFDS serves offer of judgment on counsel for Plaintiff. (Dkt. No. 19).

December 27, 2016: Virginia DMV rejects the title reinstatement request because the submission did not include a 4.15% sales and use tax. (***Exhibit F***).

December 30, 2016: WFDS resubmits title reinstatement request to Virginia DMV with a Statement of Tax Exemption. (***Exhibit F***).

January 4, 2017: Plaintiff files notice of acceptance of offer of judgment. (Dkt. No. 19).

January 18, 2017: WFDS informs Plaintiff that Virginia has completed the reinstatement process and issued an electronic title with Ms. Kitchen listed as the owner. (***Exhibit G***).

January 24, 2017. Plaintiff confirms that she was able to register her car. (***Exhibit H***).

On February 1, 2017, Plaintiff filed the Fee Application in which she seeks $12,333.33 in attorney's fees and expenses in addition to the $10,000 offer of judgment.

2. Plaintiff Also Received a Substantial Judgment That Includes Her Fees.

As set forth above, WFDS took reasonable steps at all times to get the title reinstated in Plaintiff's name, and even obtained an exemption from the sales and use taxes at no costs to Plaintiff. In an attempt to avoid further litigation and expense, WFDS also made a $10,000 offer of judgment to resolve the claims in the complaint. Plaintiff accepted the offer of judgment.

There is no question that Plaintiff and her counsel understood that the offer of judgment included legal fees. Plaintiff's counsel admitted as much. On January 4, 2017, counsel for WFDS spoke with Mr. Weed and requested a W-9 for use in processing the check. Mr. Weed asked if the check could be written to his firm or if two checks could be issued "so his client would not receive a W-9 for his share" of the judgment amount. Counsel for WFDS responded to this request:

> Please send me your firm's W-9 as well. I will see if we can make the check payable to your office, or if we can cut two checks. I would need to confirm with the Chapter 13 Trustee that (s)he does not object to us doing so.

(***Exhibit I***).

Mr. Weed subsequently changed his mind and decided to try to recover attorney's fees in addition to the offer of judgment. For the reasons discussed below, Plaintiff is not entitled to any legal fees.

3. Plaintiff's Attorney's Fees Do Not Qualify as "Costs" Under Rule 68.

Although her counsel previously recognized that the $10,000 offer of judgment included his firm's fees, Plaintiff now argues that she is entitled to $12,333.33 in "reasonable attorneys' fees and costs" in addition to the $10,000 offer of judgment. Plaintiff contends that fees are a part of "costs" that she can recover as part of the offer of judgment under Rule 68. Plaintiff's argument is based on *Marek v. Chesney*, 473 U.S. 1 (1985), in which the Supreme Court found that "where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." *Marek*, 473 U.S. at 9. Plaintiff's reliance on *Marek*, however, is misplaced. Unlike the statute at issue in *Marek*, 11 U.S.C. 362(k)(1) does not define "costs" to include attorney's fees. To be clear, neither § 362(k)(1) nor Rule 68 authorize a separate award of fees to Plaintiff in this case.

In *Marek*, the Court considered "whether the term 'costs' as used in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988." *Marek*, 473 U.S. at 5. This statute provides that, in an action or proceeding under certain civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, *a reasonable attorney's fee as part of the costs*." 42 U.S.C. § 1988(b) (emphasis added). In evaluating this statute in the context of Rule 68, the Court explained:

> Pursuant to … 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as a part of the costs." Since Congress expressly includes attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68.

Marek, 473 U.S. at 9. Thus, the Supreme Court allowed fees as "costs" under Rule 68 because the underlying statute explicitly defined attorney's fees "as a part of the costs."

In this adversary proceeding, Plaintiff claims that she is entitled to legal fees for a willful violation of the automatic stay in violation of 11 U.S.C. § 362(k)(1). Unlike the statute at issue in *Marek*, § 362(k)(1) does *not* identify attorney's fees as a part of costs. Section 362(k)(1) specifically provides that attorneys' fees are a component of the *damages*:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(k)(1). By its own language, attorney's fees are not "a part of the costs" under § 362(k)(1). Rather, attorney's fees and costs are separate and distinct components of actual damages under this statute.[1] Because attorney's fees are not a part of costs under 11 U.S.C. § 362(k)(1), this statute does not authorize granting attorney's fees as costs under Rule 68.

When the underlying statute distinguishes between attorney's fees and costs, attorney's fees are not available as costs under Rule 68. In *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996), the Court considered a request for fees in an employment discrimination case pursuant to 42 U.S.C. § 2000e-5(g)(2)(B). In this case, the statute pursuant to which plaintiff sought fees under Rule 68 provides for the recovery of "attorney's fees and costs." *Sheppard*, 88 F.3d at 1334 (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i)). The Fourth Circuit rejected the plaintiff's requests to include fees as a part of "costs" under Rule 68. In so doing, the Court emphasized that the statute distinguished attorney's fees from costs, which "makes clear that fees granted under § 2000e-5(g)(2)(B) are *not* part of 'costs' subject to Rule 68." *Sheppard*, 88 F.3d at 1337 (emphasis added). Like the underlying statute in *Sheppard*, the underlying statute under which Plaintiff seeks relief, § 362(k)(1), refers to "attorney's fees and costs," and thereby distinguishes fees from costs.[2] As in *Sheppard*, Plaintiff's fees are not a part of costs for purposes of Rule 68.

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[1] Not surprisingly, the courts recognize that attorney's fees are a component of damages under Section 362(k)(1). *In re Duby*, 451 B.R. 664, 674 (1st Cir. B.A.P. 2011) (explicitly recognizing that "attorney's fees are actual damages under 11 U.S.C. 362(k)(1))" (emphasis in original). In rejecting the argument that attorney's fees are something other than damages under section 362(k)(1), the Bankruptcy Appellate Panel recognized that attorney's fees could be the only damages recovered for a stay violation:

> By requiring a debtor to incur an injury other than attorney's fees before such fees are recoverable, [defendant] effectively strikes the word "including" from the statute.

Duby, 451 B.R. at 674. Thus, the case law recognizes that attorney's fees are actual damages under section 362(k)(1) and, in fact, that they may be the only damages recoverable for a stay violation.

In sum, *Malek* established that attorney's fees can be awarded as costs under Rule 68 if the fees are "a part of the costs" in the underlying fee-shifting statute. The underlying statute in this case, 11 U.S.C. § 362(k)(1), does not include fees as "a part of the costs." Because the fees are a part of damages under § 362(k)(1), and are distinct from costs, Plaintiff is not entitled to attorney's fees as costs in this adversary proceeding. *Sheppard*, 88 F.3d at 1337.

4. Plaintiff Has Not Met Her Burden To Establish That She Is Entitled to Fees.

a. Post-Offer of Judgment Fees Are Not Allowed.

Even if attorney's fees were available as costs under § 362(k)(1) (and they are not), Plaintiff would not be entitled to the fees that she seeks. There are numerous flaws in the Fee Application.

First and foremost, Plaintiff improperly seeks fees for the time period after the service of the offer of judgment on December 22, 2016. There is no legal support for this position. The entire premise of the Fee Application is the argument that, under § 362(k)(1), Plaintiff's fees are "costs" that may be awarded under Rule 68. Even if this statute qualified (and it does not), fees are not allowable after the date of service of the offer of judgment. Rule 68, by its own terms, only allows for "the costs then accrued." Fed. R. Civ. P. 68. Courts that have allowed fees as Rule 68 "costs" under fee-sharing statutes have allowed fees only through the date of the offer of judgment. *See Bosley v. Mineral County Commission*, 650 F.3d 408 (4th Cir. 2011) (allowing "pre-offer" fees as "costs" under Rule 68 in an action under 42 U.S.C. § 1988).

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[2] Of course, as a basic matter of statutory construction, the reference to "damages, including costs and attorney's fees," unambiguously provides that fees are separate and distinct from costs.

Notwithstanding Rule 68's language limiting the recovery to "the costs then accrued" and the case law interpreting this rule, Plaintiff seeks at least $5,396.67 in post-offer attorney's fees, including "the time spent producing the fee application and costs associated with the application." (Dkt. No. 23-1, p. 1). Plaintiff has cited no authority for the overreaching request to obtain a judgment for post-offer attorney's fees after accepting an offer of judgment. There is no such authority. All fees incurred after December 22, 2016, including any fees and costs associated with pursuing the Fee Application, must be denied.

b. Plaintiff is Not Entitled to the Pre-Offer Fees in the Fee Application.

Plaintiff seeks additional fees that are not allowable under § 362(k)(1). Attorneys' fees under § 362(k)(1) "must be shown to be reasonable and necessary." *Skillforce, Inc. v. Hafer*, 509 B.R. 523, 534 (E.D. Va. 2014). In addition, "before the analysis of reasonableness and necessity of claimed attorneys' fees even begins, a debtor must first demonstrate, by a preponderance of the evidence, that she is *actually* liable for the claimed fees." *Id.* (emphasis in original). Thus, before she may recover any fees, Plaintiff must show that she is actually liable for the fees, and that they are reasonable and necessary. In this case, Plaintiff has failed to provide any evidence to suggest that she is actually liable to her law firm for the requested fees, which precludes an award of any fees.

But even if Plaintiff were actually liable for the fees sought by her counsel, she has not satisfied her burden to justify an award of fees. A fee applicant "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). To calculate an appropriate attorneys' fee award, "a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Services, LLC*, 560 F.3d 235, 243 (4th Cir. 2009) (*citing Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008)). The lodestar factors were adopted by the Fourth Circuit in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978).[3] To demonstrate the reasonableness of the hourly rates, the applicant must "produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award. *Robinson*, 560 F.3d at 244 (quoting *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990)). "The applicant should [also] exercise 'billing judgment' with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437 (internal citations omitted). "After determining the lodestar figure, the court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones." *Robinson*, 560 F.3d at 244 (*quoting Grissom*, 549 F.3d at 321) (internal quotation marks omitted).

Plaintiff has not, and cannot, satisfy this burden. Although she submitted a Statement of Time and Expenses (Dkt. No. 23-4) with the Fee Application, this statement does not contain the most basic information required in support of a request for fees. For instance, even though the first factor for determining a lodestar figure is "the time and labor expended," the Statement of Time and Expenses does not identify the amount of time expended for each time entry. In some cases, the timekeeper is not even identified. *See* Dkt. 23-4, entries for 11/9/16, 11/29/16, 12/1/16, 12/8/16, 1/6/17 (seeking $750 for "drafting opposition to motion to dismiss" without identifying the timekeeper or amount of time), 1/9/17.

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[3] These factors are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations as the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 N.28 (4th Cir. 1978).

The statement of time and expenses suffers from other substantial flaws that preclude an award of fees. These flaws include:

Unnecessary and Unsuccessful Hearings. Movant seeks fees for an internal discussions regarding WFDS's request that the motion for preliminary injunction be removed from docket. *See* Dkt. 23-4, entries for 10/31/16, 11/1/16. Movant also seeks $450 in fees for attending a 12 minute hearing during which Plaintiff was not present, was unable to present any evidence, and wholly failed to satisfy her burden of proof. *Id.*, entry for 11/8/16. None of these fees are reasonable and necessary, nor did they produce a successful result.

Discovery Not Served. Movant seeks at least $900 in fees for preparing discovery that was never served on WFDS. *See* Dkt. 23-4, entries for 12/3/16 ("RWW instructions to DPP re: Draft discovery instructions"), 12/5/16, 12/19/16 ("review Denise's draft interrogatories"). As no discovery was served, any fees regarding discovery were not necessary. Moreover, there is no evidence that Plaintiff is actually liable for these fees.

Items Not Filed or Scheduled for Hearing. Movant seeks fees for preparing a notice of motion and notice of hearing that was never filed. *See* Dkt. 23-4, entry for 12/8/16. Movant also seeks fees for preparing an renewed motion for injunction and motion for expedited hearing *Id.*, entries for 12/6/16, 12/8/16. This motion was never scheduled for hearing. Again, these fees are not reasonable and necessary and did not lead to a successful result.

Lumped Time. Counsel improperly "lumps" time together in numerous entries. *See* Dkt. 23-4, entries for 9/30/16, 10/3/16, and 12/6/16. "[L]umping provides a proper basis for reducing the fee award because it prevents an accurate determination of the reasonableness of the time expended." *Guidry v. Clare*, 442 F.Supp.2d 282, 295 (E.d. Va. 2006).

Chapter 13 Services. Movant seeks an award of fees for discussions with Ms. Kitchen on issues unrelated to this adversary proceeding. *See* Dkt. 23-4, entries for 10/18/2016 (regarding proof of claim), 11/9/16 (how to resolve traffic tickets), 12/30/16 (how potential purchase of used car would interface with Chapter 13).

Duplication of Work. Movant seeks approval of a rate for Ms. Pitts that reflects her "27 years' experience." (Dkt. No. 23-2, p. 1). No fees should be awarded for Mr. Weed to review items prepared by an attorney with 27 years of experience. These include reviewing a notice of hearing (10/13/16), reviewing initial disclosures (12/5/16), reviewing a notice of hearing that was never filed (12/8/16), and reviewing draft discovery (12/19/16). Plaintiff also seeks $350 for preparing an amended motion for preliminary injunction (10/13/16), which should not have been necessary.

Improper Attempts to Contact WFDS Directly. The Statement of Time and Expenses also indicates that, on January 3, 2017, Mr. Weed "tried to contact person at WF that personally contacted AK." *See* Dkt. 23-4, entry for 1/3/2017. Counsel neither requested nor received permission from WFDS's counsel to attempt to contact WFDS directly. This inappropriate contact was neither reasonable nor necessary.

WFDS reserves the right to raise additional objections to the Statement of Time and Expanses and time entries contained therein if Plaintiff attempts to present evidence at a hearing regarding fees.

c. Plaintiff's Purported Expert Notice Does Not Comply With the Rules.

Finally, WFDS objects to Plaintiff's Notice of Intent to Use Expert Witness in Support of Application for Attorney's Fees and Costs that was filed (Dkt. 23-3) in connection with the Fee Application. WFDS objects to any testimony from any such expert witness because (1) Plaintiff has not provided expert disclosures in this adversary proceeding as required by FRBP 7026 and FRCP 26(a)(2)(B); and (2) the deadline for serving expert disclosures in this case was "not later than 60 days after the issuance of the summons" on October 12, 2016. *See* Initial Scheduling Order, Dkt. No. 4. As such, the deadline for serving expert disclosures was December 12, 2016. Having ignored this deadline, Plaintiff cannot now seek to disclose an expert to litigate the issue of legal fees.

Conclusion

For all of these reasons, the Fee Application should be denied in its entirety.

Respectfully submitted,

/s/ J. David Folds

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

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